Office-Supreme Court, U.S.
FILED
MAR 21 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-1380

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MICKEY ROONEY,

Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC., METRO-GOLDWYN-MAYER INC., PARAMOUNT PICTURES CORP., RKO GENERAL, INC., TWENTIETH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., UNIVERSAL CITY STUDIOS, INC., and WARNER BROS. INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROY L. REARDON*
SIMPSON THACHER & BARTLETT
(A partnership which includes professional corporations)
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

* *Counsel of Record*

Attorneys for all Respondents except RKO General, Inc., United Artists Corp., and Warner Bros. Inc.

March 21, 1983

[List of Counsel Continued on Inside Cover]

GERALD F. PHILLIPS*
PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
40 West 57th Street
New York, New York 10019
(212) 977-9700
Attorneys for Respondents
United Artists Corp. and
Warner Bros. Inc.

HARRY YOUTT*
THAL & YOUTT
350 Broadway
New York, New York 10013
(212) 334-9000
Attorneys for Respondents
RKO General, Inc.

* *Counsel of Record*

Questions Presented

1. Did the lower courts properly hold that Petitioner could not avoid his facially valid and legal employment contracts, made with Respondents prior to 1960, by claiming that those contracts were the result of an antitrust conspiracy during the years 1930-1960?

2. Was the Circuit Court correct in holding that an affirmative claim based on the alleged 1930-1960 antitrust conspiracy was barred by the four year statute of limitations?

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Opinion Below	2
Counterstatement of the Case	2
Mr. Rooney's Individual Contracts	3
Collective Bargaining Agreements	5
Mr. Rooney's 1981 Lawsuit Over Pre-1960 Movies	6
Reasons for Denying the Writ	9
Summary of Argument	9
POINT I—The District Court's Decision, Summarily Affirmed by the Court of Appeals, Properly Applied This Court's Decisions in *Kelly* v. *Kosuga* and *Kaiser Steel Corp.* v. *Mullins* to the Facts of This Action	10
A. This Case Does Not Involve Any Unsettled Legal Issues; It Only Involves the Proper Application of Settled Legal Issues to the Facts of This Case	10
B. The Courts Below Properly Refused to Let Mr. Rooney Raise an Antitrust Defense to His Obligations Under a Facially Valid Contract	11
1. Mr. Rooney's procedural status as a nominal plaintiff does not resolve the substantive question of the availability of antitrust defenses to his pre-1960 contracts	12

PAGE

2. Since Mr. Rooney admits his pre-1960 contracts are legal on their face, he is barred from raising a collateral claim of an antitrust conspiracy solely as a defense to those contracts 13

POINT II—The Second Circuit Properly Held That an Affirmative Claim for Damages Based on the Alleged 1930-1960 Conspiracy Was Barred by the Statute of Limitations 14

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Aurora Enterprises Inc. v. *National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982) 2, 15, 16

Kaiser Aluminum & Chemical Sales, Inc. v. *Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, —— U.S. ——, —— S. Ct. ——, 51 U.S.L.W. 3508 (Jan. 10, 1983) 2, 10, 15

Kaiser Steel Corp. v. *Mullins*, 455 U.S. 72 (1982) 1, 10, 11, 13, 14

Kelly v. *Kosuga*, 358 U.S. 516 (1959) ..... *Passim*

Viacom International Inc. v. *Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975) 2, 10

Williamsburg Wax Museum v. *Historic Figures, Inc.*, 1982-83 Trade Cas. ¶ 65,202 (D.D.C. 1982) 16

Zenith Radio Corp. v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) 1, 15, 16

Statutes and Rules

15 U.S.C. § 15b 9

2nd Cir. R. 0.23 ..... 2, 11

IN THE

Supreme Court of the United States

October Term, 1982

No. 82-1380

MICKEY ROONEY,

Petitioner,

v.

COLUMBIA PICTURES INDUSTRIES, INC., METRO-GOLDWYN-MAYER INC., PARAMOUNT PICTURES CORP., RKO GENERAL, INC., TWENTIETH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., UNIVERSAL CITY STUDIOS, INC., and WARNER BROS. INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents [1] respectfully request that Mickey Rooney's Petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit be denied. That judgment, and the decision by the District Court that it summarily affirmed, properly applied this Court's decisions in *Kelly* v. *Kosuga*, 358 U.S. 516 (1959), *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982), and *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321 (1971) to the facts in this case. The result was in

---

[1] Respondents' statements pursuant to Supreme Court Rule 28.1 are set forth on pages 5a to 10a of the Appendix to this Brief.

harmony with numerous Court of Appeals decisions, such as *Viacom International Inc.* v. *Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975), *Aurora Enterprises Inc.* v. *National Broadcasting Co.*, 688 F.2d 689 (9th Cir. 1982) and *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982), *cert. denied*, — U.S. —, — S.Ct. —, 51 U.S.L.W. 3508 (Jan. 10, 1983). There is therefore no reason to grant certiorari, as the legal issues are well settled, the Second Circuit's decision does not conflict with decisions of this Court or of other Circuit Courts, and the legal issues were properly applied to the facts of this case.

Opinion Below

The Second Circuit affirmed the District Court's judgment by summary order, without an opinion. The explanatory statement annexed to that order is not an opinion and cannot be cited as precedent in any other case. This is made clear in a sentence that Petitioner deleted from the Order:

> "N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court."

See 2nd Cir. R. 0.23. (A full copy of that Order, including this sentence, is reproduced on pages 1a-4a of the Appendix to this Brief.)

Counterstatement of the Case

This case is about old movies and old contracts. Mr. Rooney claimed in his complaint that he had the right to all revenues resulting from the nontheatrical exhibition of

any pre-1960 movies in which he appeared. (A8)[2] Respondents moved for summary judgment, since his employment contracts for those pre-1960 movies clearly granted to Respondents all rights to revenues from the exhibition of those films in any medium. Mr. Rooney, whose complaint did not even mention his contracts, tried to avoid summary judgment by claiming that every contract, from 1932 to 1960, was the result of an industrywide antitrust conspiracy.

The only issue raised by Petitioner is whether the lower courts were correct in deciding that he could not use this "antiquated conspiracy" (A46) to defeat Respondents' assertion of their contractual rights; its assertion as a defense was held barred by *Kelly* v. *Kosuga* and its assertion as an affirmative claim was barred by the statute of limitations. The correctness of that decision is apparent from the facts before the lower courts.

Mr. Rooney's Individual Contracts

When they moved for summary judgment, Respondents submitted contracts for every relevant pre-1960 film in which Mr. Rooney appeared, from "The Sucker", made by Warner Bros. in 1932, to "Platinum High School", made for M-G-M in 1939. (A31, n.5)

Those contracts clearly and explicitly dealt with the producers' and distributors' rights to those films. For example, in 1934 Mr. Rooney signed an exclusive contract with M-G-M, paying him $300 a week. He was 13 years old.[3]

---

[2] References to "A—" are to the relevant pages in the Appendix to the Petition. References to "App. A—" are to the relevant pages in the Joint Appendix on Appeal in the Second Circuit.

[3] Mr. Rooney's contracts were negotiated for him by experienced agents. Moreover, all of his contracts that were signed while he was a minor were approved by the California Superior Court as "fair and equitable." (A44)

According to the District Court, that contract provided that:

> "[M-G-M had] the right to exhibit the films [he appeared in] 'with sound and voice recording, reproducing and/or transmitting devices, radio devices, and all other improvements and devices which are now or may hereafter be used in connection with the production and/or exhibition and/or transmission of any present or future kind of motion picture production,' and further provided that MGM shall 'have the right to photograph and/or otherwise produce, reproduce, transmit, exhibit, distribute, and exploit in connection with the said photoplay any and all of the artist's acts, poses, plays and appearances of any and all kinds hereunder.' " (A31-A32)

That contract also provided that M-G-M had exclusive rights to Mr. Rooney's services "in connection with the broadcasting and/or transmission of his likeness and/or voice by means of television, radio and/or otherwise, whether such broadcasting and/or transmission be either directly or indirectly in connection with or independent of photoplays," and further provided that MGM had "solely and exclusively all rights of every kind and character whatsoever in and to the [photoplays]." (A32)

The language dealing with exhibition rights in Mr. Rooney's pre-1960 films varied from contract to contract and from producer to producer, but each of Mr. Rooney's contracts with Respondents gave them the right to exhibit the films in all media.[4] *See generally* A8-A36. Mr. Rooney does not challenge this holding. (Petition, pp. 4-5)

---

[4] Mr. Rooney's 1950 contract with Columbia Pictures gave him the right to a percentage of the television revenues from the three films made under that contract. In 1957 he sold that right back to Columbia for $30,000. (A16)

Collective Bargaining Agreements

Industrywide collective bargaining has been the practice in the movie industry since 1927. Petitioner refers to a "standard contract" dealing with such rights. (Petition, p. 4) That contract was the result of a 1930 collective bargaining agreement between the studios and the Actors Division of the Academy of Motion Picture Arts and Sciences. (App. A63)

When the Screen Actors Guild ("SAG") became the exclusive bargaining agent for movie actors in 1937, it adopted those provisions of the Academy Contract that dealt with producers' rights in films. (1937 SAG contract, Exhibit 4 to Appendix D to Reply Memorandum on Summary Judgment, p. 3) A similar clause can be found in every SAG collective bargaining agreement since 1937. (*See, e.g.*, App. A151; A17) Mr. Rooney has been a member of SAG since 1937. (A26)[5]

In 1948 SAG and the producers began negotiations about the television exhibition of films. They agreed that any films made before 1948 could be shown on television without compensating the actors in them. They left unresolved the question of television exhibition of post-1948 films. SAG, however, reserved the right to cancel the collective bargaining agreement and reopen negotiations if a post-1948 film were shown on television. (Exhibit 39 to Summary Judgment Motion, p. 3)

Television exhibition of post-1948 movies was still an unresolved issue when collective bargaining began again

---

[5] These collective bargaining agreements only set minimum terms. Contrary to Mr. Rooney's assertion (Petition, pp. 4-5), many actors were able to obtain significantly better terms through individual negotiations. Indeed, many actors, including Mr. Rooney, obtained the right to a percentage of the revenues from the theatrical and non-theatrical exhibition of their films. *See, e.g.*, A15-A16; App. A225-App. A231.

in 1960. SAG went on strike for a month over this issue. The dispute was finally resolved with an agreement by the producers (1) to pay $2,625,000 to set up a health plan and a pension plan for all actors and (2) to pay actors a percentage of television revenues from films made after 1960. In return, SAG agreed that "[a]s to all theatrical motion pictures, the principal photography of which commenced prior to February 1, 1960, the Guild does not and will not make any claim for compensation for the exhibition of such motion pictures on television." (A27) Mr. Rooney does not challenge the legality or fairness of this Agreement.

In 1971 SAG and the producers expanded their agreement to cover the exhibition of movies in "Supplemental Markets." As defined in that Agreement, Supplemental Markets included (a) the sale of cassettes for use in home television systems, (b) Pay-Type CATV, and (c) Pay Television, which includes pay-per-view systems. The producers agreed that actors would receive a percentage of the revenues from the exhibition in a Supplemental Market of a movie made after 1971. The 1971 agreement did not grant actors any such rights in movies made before 1971. (A28-A30)

Mr. Rooney's 1981 Lawsuit Over Pre-1960 Movies

In July, 1981, almost fifty years after he signed his first contract, Mr. Rooney sued Respondents over pre-1960 movies. His complaint did not mention his contracts or his collective bargaining agreements.[6] He claimed that he was entitled to receive all revenues from nontheatrical exhibition of pre-1960 films in which he appeared, and that he

[6] Mr. Rooney's counsel admitted in oral argument before the Second Circuit that he had not seen any of Mr. Rooney's contracts when he filed this complaint.

had not received those revenues because of an antitrust conspiracy. (A7-A8)

Respondents moved for summary judgment, since Mr. Rooney's claim—that he owned the right to revenues from nontheatrical exhibition of pre-1960 films—was incorrect. (A8) All such rights were conveyed to his employers when he signed his employment contracts. Since he had no right to any such revenues, he was not injured by Respondents' failure to pay those revenues to him. (A8, A48)

Mr. Rooney responded that each of his contracts—from 1932 to 1960—was the result of an industrywide antitrust conspiracy that began around 1910 and ended in 1960. (Memo in Opp. to Summ. J., p. 48, ¶¶ 5-7) (A45-A46) The purpose of that conspiracy was allegedly to force all actors to sign employment contracts granting to their employers all rights to exhibit the movies in which they appeared.[7]

Mr. Rooney did not try to bring an affirmative claim based on this conspiracy. In fact, he told the District Court that "Plaintiff's complaint does not claim damages for damages inflicted in 1930 . . . It is to rebut defendants' defense by avoiding enforcement of the illegally obtained provisions, not as a claim for damages, that the early conspiracy has become an issue." (Sur-Reply Memo., pp. 15-16)

Mr. Rooney also did not claim that there was anything illegal on the face of those contracts. He could not. The

---

[7] Respondents submitted substantial evidence that no such conspiracy existed. Indeed, the alleged conspiracy was an alternative argument, since Mr. Rooney also argued that the contracts were never meant by any party to cover nontheatrical distribution rights. (A39-A43) The District Court did not reach the lack of proof of a conspiracy, since it held that even if a conspiracy had existed, Mr. Rooney could not raise it as a defense to his contracts. (A46)

same "all rights" language is found in contracts after 1960. (Exhibit 43 to Summary Judgment Motion, p. 67; Exhibit 45 to Summary Judgment Motion, p. 78) Mr. Rooney has never claimed that any employment contract signed after 1960 is illegal. Thus, it is not the language of the pre-1960 contracts themselves that he claims is "illegal", but only the alleged underlying conspiracy.

The District Court held that since Mr. Rooney, by his own admission, was raising antitrust illegality only as a means of avoiding his contractual obligations, he was essentially raising an antitrust defense to a contract claim. (A46) Since it was clear that there is nothing illegal on their face about these contracts, and that enforcing them would not cause anyone to do anything in violation of the antitrust laws, the District Court held that Mr. Rooney's antitrust defense to his contracts was barred by *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). (A46)

The District Court also noted that Mr. Rooney had specifically stated that he was not raising an affirmative claim for damages based on the 1930-1960 conspiracy. The District Court stated that such "an antiquated conspiracy", if raised as an affirmative claim, would face "a substantial statute of limitations obstacle." (A46)

On appeal Mr. Rooney seemed to say, contrary to what he had told the District Court, that he had meant to assert an affirmative claim for damages based on this "antiquated conspiracy." (Appellant's Brief, pp. 4, 9, 15, 19) He also argued that his antitrust defense to his contracts was not barred by *Kelly* v. *Kosuga*. The Second Circuit panel, Judges Kaufman, Newman and Timbers, rejected these arguments and summarily affirmed the dismissal. (A1)

In a non-publishable explanation the Second Circuit explained that any affirmative claim Mr. Rooney might have had based on the alleged 1930-1960 conspiracy was barred

by the statute of limitations, 15 U.S.C. § 15b. The only other use of the 1930-1960 conspiracy was as a defense to his contracts. The Second Circuit stated that such a defense was barred by *Kelly* v. *Kosuga*, 358 U.S. 516 (1959). (A3)

Reasons for Denying the Writ

Summary of Argument

The Petition should be denied. The lower courts properly held that a party cannot use a collateral claim of an alleged antitrust conspiracy as a defense to a contract, when that contract does not command any action that the antitrust laws forbid. There is no need for yet another opinion on this settled proposition, as the Second Circuit recognized when it affirmed by Order, without an opinion.

The statute of limitations was properly applied to prevent Mr. Rooney from asserting, in 1982, an affirmative claim based on his allegedly being forced to sign employment contracts during the years 1930 to 1960. First, if Mr. Rooney was coerced into giving up certain of his rights, he was necessarily aware of that fact, and thus aware of his injury, when he signed his contracts. There was nothing "speculative" about his failure to retain nontheatrical distribution rights in pre-1960 films; it was clear from the face of his contracts. Second, any possible uncertainty about his "injury" would have been resolved by 1971 at the very latest. In 1971 the same rights that Mr. Rooney claims were unknown before 1977 were made a part of the collective bargaining agreement between SAG and the producers.

POINT I

The District Court's Decision, Summarily Affirmed by the Court of Appeals, Properly Applied This Court's Decisions in *Kelly* v. *Kosuga* and *Kaiser Steel Corp.* v. *Mullins* to the Facts of This Action.

A. This Case Does Not Involve Any Unsettled Legal Issues; It Only Involves the Proper Application of Settled Legal Issues to the Facts of This Case.

Mr. Rooney claims that this case raises important questions concerning the availability of an antitrust defense to contract claims. He states that the lower courts are in need of guidance. (Petition, p. 9) In fact, this Court's recent decision in *Kaiser Steel Corp.* v. *Mullins*, 455 U.S. 72 (1982) clearly stated the rule for antitrust defenses to contracts: A party cannot set up antitrust illegality as a defense to a contract unless the contract itself calls for actions that violate the antitrust laws. *Id.* at 77-82. This is the same principle that was stated in *Kelly* v. *Kosuga*, 358 U.S. 516, 520 (1959) (an antitrust defense to a contract is permitted only "where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act.") It is the same principle that was applied in *Viacom International Inc.* v. *Tandem Productions, Inc.*, 526 F.2d 593 (2d Cir. 1975) and *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc., supra*, 677 F.2d 1045. It is the principle that was applied by the courts below.

Mr. Rooney does not seek a further explanation of his legal principle. He only seeks a review of whether it was properly applied to this action. In fact, despite his assertion that lower courts may be confused about this legal issue (Petition, p. 9), Mr. Rooney does not cite a single decision by another District or Circuit court that conflicts with the decision in this action.

The Second Circuit recognized the settled nature of the legal issues in this action. It affirmed the District Court by summary order, without a published opinion, pursuant to 2nd Cir. R. 0.23. In a recent speech to the Association of the Bar of the City of New York, Chief Judge Feinberg explained one of the reasons for such summary affirmances:

> "We use this procedure only when we believe that there is no need for another precedent on point. Let me put it this way—if there are five published, citable opinions on a proposition, why have a sixth? When the point again arises, isn't it enough for a lawyer to cite the five opinions already published?"

N.Y.L.J. March 1, 1983, p. 28, col. 5.

Furthermore, there can be no confusion or conflict among the Circuits resulting from the Second Circuit's explanation of its decision in this case. That explanation will not be published. It is not precedent. It is relevant only to the correctness of this decision in this action. Thus, the only issue presented for review is whether the decision in this case was correct; it was.

B. The Courts Below Properly Refused to Let Mr. Rooney Raise an Antitrust Defense to His Obligations Under a Facially Valid Contract.

A review of the application of *Kelly* v. *Kosuga* and *Kaiser Steel Corp.* v. *Mullins* in this case would inevitably lead to an affirmance of the decisions below. The two issues raised by Mr. Rooney are (1) whether a party can avoid the effect of *Kelly* by being the first to sue, and thus being the nominal plaintiff in the action, and (2) whether a contract that is legal on its face can be enforced, even if it allegedly was the result of an antitrust conspiracy. Both of these questions were answered properly.

1. ***Mr. Rooney's procedural status as a nominal plaintiff does not resolve the substantive question of the availability of antitrust defenses to his pre-1960 contracts.***

Although Mr. Rooney was the named plaintiff in this action, his complaint ignored his contracts. Respondents were the moving parties seeking to enforce those contracts, which granted them the right to distribute those pre-1960 films in all media. Mr. Rooney, by his own admission, only raised his 1930-1960 antitrust conspiracy claim in order to avoid Respondents' enforcement of those contracts. (Sur-Reply Memo., pp. 15-16)

Thus, as a practical matter, Respondents were enforcing their contract rights, while Mr. Rooney was trying to defeat those contracts by claiming there was an underlying antitrust conspiracy. The courts below recognized that Mr. Rooney's status as a nominal plaintiff did not alter the effect of *Kelly* v. *Kosuga,* which bars such defenses. (A3)

In fact, Mr. Rooney's position as to his contracts is the same as that of someone who has been paid for a load of onions and has failed to deliver them, claiming an antitrust conspiracy as justification. This is simply the obverse of the situation in *Kelly* v. *Kosuga,* 358 U.S. at 518.

Mr. Rooney was paid to perform in movies so that his employers could distribute them for profit. He has been well paid, and he wants to keep that money. But he claims that his employers never received the rights from him that they paid for, the rights to exhibit those movies in all media. Moreover, he claims that they cannot enforce those contracts now because of his claim that there was an antitrust conspiracy connected with those contracts. *Kelly* v. *Kosuga* bars this result, just as surely as it barred Mr. Kelly from buying a load of onions and not paying for it. As this Court stated in *Kelly* v. *Kosuga*:

> "Past the point where the judgment of the Court would itself be enforcing the precise conduct made unlawful by the Act, the courts are to be guided by the overriding general policy, as Mr. Justice Holmes put it, 'of preventing people from getting other people's property for nothing when they purport to be buying it.' *Continental Wall Paper Co.* v. *Louis Voight & Sons Co., supra,* at 271 (dissenting opinion)."

Id. at 520-21.

2. *Since Mr. Rooney admits his pre-1960 contracts are legal on their face, he is barred from raising a collateral claim of an antitrust conspiracy solely as a defense to those contracts.*

Mr. Rooney claims that his contracts are unenforceable even if *Kelly* v. *Kosuga* and *Kaiser Steel Corp.* v. *Mullins* apply. (Petition, p. 12) He is wrong. *Kaiser Steel Corp.* v. *Mullins* and *Kelly* v. *Kosuga* both state that the antitrust laws bar enforcement of contracts only if the contracts are illegal on their face, *i.e.,* if enforcement would result in ordering a party to violate the antitrust laws. *Kaiser Steel Corp.* v. *Mullins, supra,* 455 U.S. at 80; *Kelly* v. *Kosuga, supra,* 358 U.S. at 520.

Mr. Rooney does not claim that there is any clause in his pre-1960 contracts that is illegal. Indeed, similar contracts signed after 1960 are not being challenged. Mr. Rooney is thus claiming that legal contract terms can be rendered illegal solely by reference to an alleged collateral conspiracy. This is precisely the type of antitrust defense to a contract that is barred by *Kelly* and by *Kaiser Steel.*

In *Kaiser Steel,* this Court refused to enforce a contract that, on its face, required a coal buyer to impose discriminatory costs on coal sellers. If the court had enforced that

contract, it would have meant ordering the coal buyer to engage in anti-competitive price discrimination among competitors. *Kaiser Steel Corp.* v. *Mullins, supra,* 455 U.S. at 78, n.5. No reference to an independent conspiracy was necessary. The anticompetitive effect was apparent from the face of the contract. *Id.* at 82.

By contrast, Mr. Rooney tacitly admits that, absent the alleged underlying conspiracy, enforcing these contracts would not have any anticompetitive effect. Since enforcing his pre-1960 contracts would not command any conduct that the antitrust laws forbid, his antitrust defense to those contracts was properly rejected.

POINT II

The Second Circuit Properly Held That an Affirmative Claim for Damages Based on the Alleged 1930-1960 Conspiracy Was Barred by the Statute of Limitations.

The second of Mr. Rooney's questions concerns the statute of limitations and his claim of a 1930-1960 conspiracy. Mr. Rooney did not bring an affirmative damages claim based on the 1930-1960 conspiracy. (A46) Indeed, he explicitly told the District Court that he was not bringing such a claim. (Sur-Reply Memo., pp. 15-16; A46) The Second Circuit dealt with the possibility of such an affirmative claim in the context of Mr. Rooney's attempt to avoid *Kelly* v. *Kosuga.* It noted that if Mr. Rooney was raising these claims only as a defense to his contracts, he was barred by *Kelly* v. *Kosuga.* If, on the other hand, Mr. Rooney's 1930-1960 conspiracy claim was being raised affirmatively rather than defensively, then it was barred by the statute of limitations. (A3)

There was nothing difficult about the application of the statute of limitations to Mr. Rooney's claims. Indeed, the same issues raised by Mr. Rooney were decided in *Aurora Enterprises, Inc.* v. *National Broadcasting Co., supra,* 688 F.2d at 689 (9th Cir. 1982) and *Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc., supra,* 677 F.2d at 1053-55. Both cases repeated a long line of authority that holds that a cause of action accrues when an injury occurs. If the injury was the loss of rights from signing a contract, then that injury occurred and the cause of action accrued when the contract was signed and the rights were lost. Thus, Mr. Rooney's last cause of action for being coerced into signing a contract accrued in 1959, when he signed his last pre-1960 contract. (A3)

Mr. Rooney apparently admits the general validity of this principle. He is only asking this Court to review the Second Circuit's decision that Mr. Rooney's affirmative claims, had he brought them, would not have fallen within the "speculative damages" exception to the statute of limitations, set forth in *Zenith Radio Corp.* v. *Hazeltine Research, Inc.,* 401 U.S. 321 (1971). (Petition, pp. 13-15)[8]

Review is not necessary on this point, as *Zenith* does not save Mr. Rooney's antiquated claims from the statute of limitations. In *Zenith* this Court held that proof of the fact of damage is a part of an antitrust cause of action. If the fact of damage is too speculative to be provable, then no cause of action exists. The cause of action does not accrue until the fact of damage can be proven. *Id.* at 339.

---

[8] The District Court did not address this point because Mr. Rooney did not raise it. In fact, Mr. Rooney first raised the "speculative damages" exception to the statute of limitations in his Reply Brief on appeal, which was also the first time in this litigation that Mr. Rooney ever cited *Zenith.*

However, the fact of damage is distinct from the amount of damages. This Court has permitted much greater flexibility in proving the amount of damages once their existence has been established. Thus, difficulty of proof as to the amount of damages does not toll the statute of limitations. *See Aurora Enterprises* v. *National Broadcasting Co., supra,* 688 F.2d at 694 ("Mere uncertainty as to the extent or amount of damage will not bar recovery under the antitrust laws. *Story Parchment Co.* v. *Paterson Paper Co.,* 282 U.S. 555, 562, 51 S. Ct. 248, 250, 75 L. Ed. 544 (1931).")

Mr. Rooney claims that under *Zenith* the statute of limitations as to his pre-1960 contracts was tolled until 1977, because before 1977 the "new and revolutionary" methods of exhibition were too speculative to prove. The Court of Appeals properly rejected that claim. If Mr. Rooney suffered any injury at all, it was provable the day he signed a contract conveying "all rights" when he claims he wanted to convey only "theatrical exhibition rights." (A3)

Indeed, Mr. Rooney could not have been "coerced" into giving up those rights unless (1) he was aware of those rights at the time he was negotiating those contracts and (2) he wanted to retain those rights. Coercion, after all, implies that at some point Mr. Rooney resisted his employers' demand that his contracts convey "all rights." Since he was necessarily aware that he lost those rights when he signed his contracts, he could immediately have sued to regain those rights. *See, e.g., Williamsburg Wax Museum* v. *Historic Figures, Inc.,* 1982-83 Trade Cas. ¶ 65,202 at p. 71,843 (D.D.C. 1982) (plaintiffs' claims for being coerced into signing unfavorable contracts in or before 1967 were time-barred; unlike *Zenith,* any injury to plaintiffs was the result of a contract, and they could have sued to have the contract reformed or set aside as soon as it was signed.)

Even if this analysis were incorrect, and the fact of damages was indeed too speculative to have been proven in 1932 or 1960, it is undisputed that it would have been provable by 1971. Mr. Rooney claims that he was injured because there is not a provision in his pre-1960 contracts granting him a portion of the revenues from "new and revolutionary" forms of exhibition such as videocassettes, videodisks, pay television, cable television and "direct broadcast" satellite transmission. (Petition, pp. 4, 13) However, in 1971 SAG and the producers signed an agreement that gave actors a portion of the revenues from the exhibition of post-1971 movies on videocassettes, videodisks, pay television, cable television and any other form of television.[9] (A28-A30)

If Mr. Rooney had gone into court in 1971 and stated that because of an antitrust conspiracy his pre-1971 contracts did not give him such rights while his post-1971 contracts did, there is no possibility that the fact of injury would have been dismissed as too "speculative" to be proven. Thus, under the broadest possible reading of *Zenith* and the facts in this case, Mr. Rooney's claims arising from the 1930-1960 conspiracy accrued in 1971. By the time they were first raised in 1982, those claims were barred by the statute of limitations.

---

[9] Many of these "new" uses were not new even in 1971. Television was mentioned in Mr. Rooney's 1934 contract with M-G-M. (A10) The 1960 SAG Agreement dealt with Pay Television. (App. A220) Moreover, there is nothing new about satellite transmission. As pointed out to the District Court in Defendants' Joint Reply Memorandum on Summary Judgment, satellite transmission was first suggested by Arthur C. Clarke in 1945. The first satellite transmission of television signals was in 1962. (1981 Encyclopedia Brittanica: Vol. II, p. 96; Vol. IX, p. 874)

CONCLUSION

This case involves issues so clear and settled that the Second Circuit did not believe they merited an opinion. Review would thus not provide any further guidance on any legal issues. Review is also unnecessary on any other ground, as the decisions below were clearly correct. Accordingly, and for the reasons set forth above, Respondents respectfully request that Mr. Rooney's petition for a writ of certiorari be denied.

Respectfully submitted,

ROY L. REARDON*
SIMPSON THACHER & BARTLETT
(A partnership which includes professional corporations)
One Battery Park Plaza
New York, New York 10004
(212) 483-9000

Attorneys for all Respondents except RKO General, Inc., United Artists Corp., and Warner Bros. Inc.

GERALD F. PHILLIPS*
PHILLIPS, NIZER, BENJAMIN, KRIM & BALLON
40 West 57th Street
New York, New York 10019
(212) 977-9700

Attorneys for Respondents United Artists Corp. and Warner Bros. Inc.

* *Counsel of Record*

HARRY YOUTT*
THAL & YOUTT
350 Broadway
New York, New York 10013
(212) 334-9000

Attorneys for Respondent
RKO General, Inc.

* *Counsel of Record*

March 21, 1983

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
No. 82-7403

Filed November 17, 1982

Order

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 17th day of November, one thousand nine hundred and eighty-two.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE JON O. NEWMAN,
HONORABLE WILLIAM H. TIMBERS,
Circuit Judges.

MICKEY ROONEY, on behalf of himself and all others similarly situated,

Plaintiff-Appellant,

v.

COLUMBIA PICTURES INDUSTRIES, INC., METRO-GOLDWYN-MAYER, INC., PARAMOUNT PICTURES CORP., RKO GENERAL, INC., TWENTIETH CENTURY-FOX FILM CORP., UNITED ARTISTS CORP., UNIVERSAL CITY STUDIOS, INC. and WARNER BROTHERS, INC.,

Defendants-Appellees.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

Order

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellant corectly points out that a court deciding a motion for summary judgment "must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought." *Heyman* v. *Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1319-20 (2d Cir. 1975). In this case, however, no ambiguities exist. Rooney's contracts clearly and unmistakably grant the motion picture companies "any and all rights whatsoever" to exhibit appellant's films. Almost every contract specifies that Rooney has relinquished rights over exhibition of the films "by any future means, known or unknown." No additional discovery or proceedings could make these words less plain. *See Smith* v. *Lehman*, No. 82-6074, slip op. at 7 (2d Cir. Sept. 15, 1982). Moreover, Rooney's unsubstantiated doubts concerning the possible lack of authenticity of the documents are far too vague to constitute a triable issue of fact. *See SEC* v. *Research Automation Corporation*, 585 F.2d 31 (2d Cir. 1978). Accordingly, Judge Conner properly granted summary judgment on the basis of the contracts.

2. Rooney cannot escape the terms of his contracts by alleging a conspiracy in violation of the antitrust laws. Appellant's claim based on an alleged conspiracy during the period 1930-1960 is barred by the four-year statute of limitations. 15 U.S.C. § 15b (Supp. IV 1980). *See Kaiser Aluminum & Chemical Sales, Inc.* v. *Avondale Shipyards, Inc.*, 677 F.2d 1045 (5th Cir. 1982) (establishing the date

the contract is signed as beginning the four-year limitations period); *Landon* v. *Twentieth Century-Fox Film Corporation*, 384 F. Supp. 450 (S.D.N.Y. 1974) (same). Accordingly, appellees are not raising a contract defense to a valid antitrust claim. Judge Conner properly found, instead, that Rooney's attempt to employ an alleged 1930-1960 conspiracy to refute the arguments raised by the motion picture companies based on their contracts with Rooney more closely resembled the use of an antitrust claim as a defense to a contract. Such a defense is clearly impermissible. *Kelly* v. *Kasuga* [sic], 358 U.S. 516 (1959); *see also Viacom International Inc.* v. *Tandem Productions Inc.*, 526 F.2d 593 (2d Cir. 1975), and Rooney's status as a nominal plaintiff is insufficient to distinguish these cases.

3. Rooney's final claim concerning the use of his image or likeness in connection with the sale of merchandise, other than films, was insufficiently raised in the district court. Although ¶ 30 of appellant's complaint could be construed as pleading this issue, the focus of Rooney's claim centered on appellees' allegedly wrongful use of Rooney's films. In addition, Rooney made no mention of his challenge to appellees' use of his likeness in connection with the sale of products when he filed his statement of triable issues of material fact pursuant to Rule 3(g) of the Civil Rules of the Southern District of New York. Under these circumstances, Judge Conner did not err in failing to consider this claim. *See American Standard, Inc.* v. *Crane Co.*, 510 F.2d 1043, 1056 n.19 (2d Cir. 1974), *cert. denied*, 421 U.S. 1000 (1975).

4. The granting of the motion for summary judgment dismissing Rooney's claims precludes certification of the class represented by Rooney, since he is an inadequate rep-

resentative of any performers with valid claims. *See East Texas Motor Freight* v. *Rodriguez*, 431 U.S. 395, 403-404 (1977).

5. The judgment of the district court is affirmed.

/s/ IRVING R. KAUFMAN
Irving R. Kaufman,

/s/ JON O. NEWMAN
Jon O. Newman,

/s/ WILLIAM H. TIMBERS
William H. Timbers,
Circuit Judges

Statements Pursuant to Rule 28.1 of the Supreme Court

I. *Columbia Pictures Industries, Inc.*

Columbia Pictures Industries, Inc. ("CPII") is a wholly owned subsidiary of the Coca-Cola Co., (the "Company"). CPII or a CPII subsidiary is a partner in various joint ventures with the following corporations: Home Box Office, Inc.; CBS, Inc.; Gaumont Distribution, Inc.; RCA International Audio-Visuals, Inc.; Bell & Howell Video System, Inc.; Delphi Film Associates II. In addition, CPII and certain other Respondents are engaged in various joint ventures, primarily concerning the foreign distribution of theatrical motion pictures.

The following is a list of non-wholly owned subsidiaries of the Company in which the Company, directly or indirectly, has a controlling interest: INTI S.A. Industrial y Commercial; Southern Cross Beverage (Pty) Limited; P.T. Coca-Cola Indonesia; Nairobi Bottlers Limited; Amalgamated Beverage Industries (Pty) Limited; Montevideo Refrescos, S.A.; Mendoza Refrescos; Sucos do Brasil Ltda. (Sucobrasil); Ramses Agricultural Company; Concem, S.A. de C.V.; Spal-Industrial do Refrescos, S.A.; Transportadora Momentum, S.A.

II. *MGM/UA Entertainment Co.*

Metro-Goldwyn-Mayer Film Co. was the successor in interest to Metro-Goldwyn-Mayer Inc. On April 12, 1982 Metro-Goldwyn-Mayer Film Co. changed its name to MGM /UA Entertainment Co. It has no parent. Its only non-wholly owned subsidiary is MGM/UA Home Entertainment Group, Inc.

Statements Pursuant to Rule 28.1 of the Supreme Court

III. *Paramount Pictures Corp.*

Paramount Pictures Corp. is a wholly owned subsidiary of Gulf & Western Industries, Inc. Its only non-wholly owned affiliate is Sega Enterprises, Inc. In addition, various wholly owned subsidiaries of Gulf & Western Industries, Inc. or of Paramount Pictures Corp. also partially own companies and have interests in partnerships formed specifically for the purpose of exploiting particular musical, dramatic, literary or artistic properties. Paramount also is engaged in joint ventures with various other Respondents primarily relating to the foreign distribution of theatrical motion pictures. Those companies and joint ventures are not listed herein because Paramount believes that they do not fall within the term "affiliates" or "non-wholly owned subsidiaries" as used in Rule 28.1.

IV. *RKO General, Inc.*

RKO General, Inc. is wholly owned by General Tire & Rubber Co. Its only non-wholly owned subsidiary or affiliate is Frontier Holdings, Inc.

V. *Twentieth Century-Fox Film Corp.*

Twentieth Century-Fox Film Corp. is a privately-held corporation, all of the stock of which is held by TCF Holdings, Inc. One-half of the stock of TCF Holdings, Inc. is owned by RICHCO Holdings, B.V., which in turn is owned by RICHCO N.V. TCF Holdings, Inc. has no publicly-held subsidiaries or affiliates. Twentieth Century-Fox Film Corp's non-wholly owned subsidiaries are: Afram Films, Inc.; American Motion Picture Export Company (Africa), Inc.; MPD Leasehold Corp.; Motion Picture Export Association of America, Inc.

Statements Pursuant to Rule 28.1 of the Supreme Court

VI. *United Artists Corp.*

United Artists Corp. is a wholly owned subsidiary of MGM/UA Entertainment Co. Its only non-wholly owned affiliate or subsidiary is MGM/UA Home Entertainment Group, Inc.

VII. *Universal City Studios, Inc.*

Universal City Studios, Inc. ("Universal") is a wholly owned subsidiary of MCA, Inc. MCA or Universal have the following partially owned subsidiaries or affiliates within the meaning of Sup. Ct. Rule 28.1: Two-Beat Music Corp.; MCA New Ventures, Inc.; Discovision Associatres; Saticoy Technology, Inc.; Mood Music Company, Inc.; Fontaine Music; Roncon Films, Inc.; Supreme Music Corporation; Western Costume Co.; MPD Leasehold Corp.; Afram Films, Inc.; American Motion Picture Export Company (Africa), Inc.; Motion Picture Export Association of America, Inc.; Cinema International Corporation N.V.; CIC International B.V.; Pincus-Gil Music Pty. Limited; Leeds Music Hans Gerig GmbH & Co. K.G.; Spoone Music Pty. Limited; Tangerine Music Pty. Limited; Eugene Music Limited; Evita Music Limited; Jeeves Music Limited; Rowlou Music Limited; Spoone Music Limited; Valley Music Limited; Academy Investments No. 1 Pty. Ltd.; United Video International N.V.; Regent Investments Pty. Limited; Town Cinema Investments Pty. Ltd.; United International Pictures B.V.; Universal-RKO; Oak Industries Joint Venture; Hotel Two Associates; T.E.M. Programs International; USA Network; Optical Programming Associates; Overland Stage, Inc.; Thoremca Productions, Inc.; and MCA Foundation, Ltd. MCA Inc. or Universal also partially own many companies and have interests in partnerships formed specifically for the purpose of producing individual motion pictures

and/or television programs which are not listed herein because of Universal's understanding that they do not fall within the term "affiliates" or "non-wholly owned subsidiaries" as used in Rule 28.1.

VIII. *Warner Bros. Inc.*

Warner Bros. Inc. is wholly owned by Warner Communications Inc. Warner Communications Inc.'s non-wholly owned subsidiaries are: Afram Films, Inc.; American Motion Picture Export Company (Africa), Inc.; Atari Clubs, Inc.; Atari Europe; Atari-Wong Limited; Athwarn Music Co., Inc.; Aulecar, S.A. de C.V.; Australasian Film Hire Pty. Ltd.; Bright Music Ltd.; Bryanston Seven Arts Ltd.; Chatham Music Corp.; C.I.C. Warner (Proprietary) Limited; Carob Productions Inc.; C.O.G.E.D.E.P. (France); Columbia-EMI-Warner Distributions Ltd.; Columbia-Warner Filmes de Portugal Limitada; Cosmos Soccer Club, Inc.; Diffusion Musicale Du Sud-Est; Distribuidores Associados de Peliculas Ltd.; Dolmatch Publications, Inc.; Filmudlejernes Data Service ApS (FDS); Franklin Advertising Services Limited; Garden State Micro Relay, Inc.; Houston Cable TV, Inc.; Japan Records Distributing Corporation; Kenthouse Music Limited; Kirshner-Warner Bros. Music Ltd.; Leisure Development Corporation of America, Inc.; Le Medaillier Franklin S.A. (Belgium); Le Medaillier Franklin S.A. (France); Lombardo Music Corp.; MPD Leasehold Corp.; Mansfield Music Co.; Motion Picture Export Association of America, Inc.; MSC, Music Service Center Tontragervertriebs G.m.b.H.; Music Development Corporation; NASL Marketing, Inc.; New World Music Corporation; Nine Star Music Corp.; Ocean Liquors, Inc.; Orion Pictures Company Limited; Orion Pictures Company (Japan) Ltd.; OY Warner-Columbia Films, A.B.; Palm

Statements Pursuant to Rule 28.1 of the Supreme Court

Springs Communications Corporation; Producciones WEA, S.A. de C.V.; Produzione Intercontinentale Cinematografica S.p.A.; Record Service Benelux Breda; Rodart Music Corporation; Rosemeadow Publishing Corp.; Shubert Music Publishing Corporation; Surprise Music Corp.; Vernon Music Corp.; WEA-Filipacchi Music S.A.; WEA Musik GmbH; Warner Amex Cable Communications, Inc.; Warner Amex Cable Communications of Austin/Scottsburg, Inc.; Warner Amex Cable Communications of Cincinnati, Inc.; Warner Amex Cable Communications of Lynn, Inc.; Warner Amex Cable Communications of St. Louis, Inc.; Warner Amex Cable Communications of St. Paul, Inc.; Warner Bros. Music (Italy) S.r.l.; Warner Cable Corp. of Pittsburgh; Warner-Columbia Film A.B.; Warner-Columbia Filmverleih GmbH; Warner Concepts Ltd.; Warner & Metronome Film Aps; Warner-Pioneer Corporation; Weill-Brecht-Harmes Company Inc.; Western Costume Co.; Western costume, S.A.